

No. 14477

United States
Court of Appeals
for the Ninth Circuit

MARTIN JIMENEZ,

Appellant,

VS.

BRUCE BARBER,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Northern Division.

FILED

NOV 29 1954

No. 14477

United States
Court of Appeals
for the Ninth Circuit

MARTIN JIMENEZ,

Appellant,

vs.

BRUCE BARBER,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Northern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| | PAGE |
|--|------|
| Certificate of Clerk to Record on Appeal..... | 19 |
| Cost Bond on Appeal..... | 16 |
| Designation of Record on Appeal..... | 18 |
| Names and Addresses of Attorneys..... | 1 |
| Notice of Appeal..... | 15 |
| Order Dismissing Petition for Writ of Habeas Corpus | 14 |
| Order Extending Time..... | 19 |
| Order to Show Cause..... | 10 |
| Petition for Writ of Habeas Corpus..... | 3 |
| Return to Order to Show Cause..... | 10 |

NAMES AND ADDRESSES OF ATTORNEYS

GLADSTEIN, ANDERSEN & LEONARD,
LLOYD E. McMURRAY,
240 Montgomery St.,
San Francisco 4, Calif.,

Attorneys for Petitioner and Appellant.

LLOYD H. BURKE,
United States Attorney,
CHARLES ELMER COLLETT,
Asst. United States Attorney,
P. O. Bldg.,
San Francisco, Calif.,

Attorneys for Respondent and Appellee.

In the United States District Court for the Northern
District of California, Southern Division

No. 33468

In the Matter of:

The Application of Martin Jimenez for a Writ of
Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable the Judges of the above-entitled
Court:

The petition of Martin Jimenez for a writ of habeas corpus respectfully shows:

I.

That he is by birth a citizen and national of the Republic of Mexico; that he has continuously resided in the United States since 1928, and has for many years past been a resident of San Francisco, within the jurisdiction of this Court.

II.

That he is unjustly and unlawfully detained and imprisoned by Bruce Barber, District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District, in the Detention Quarters operated by the Immigration and Naturalization Service of the United States, at 630 Sansome Street, in the City and County of San Francisco, State of California, and is about to be deported from the United States to the Republic of Mexico.

III.

That the cause or pretext for such detention is a certain final order of deportation heretofore made by the Immigration and Naturalization Service of the United States ordering the deportation of your petitioner.

IV.

That your petitioner was heretofore arrested on a warrant charging him with deportability from the United States by reason of illegal entry into the United States. That proceedings were held purporting to constitute a hearing before a Hearing Officer of the Immigration and Naturalization Service as required by law. That at the said hearing your petitioner applied for suspension of deportation on the ground that he had been a resident of the United States for more than seven years prior to his application and had been for the preceding five years a person of good moral character, and was therefore eligible for suspension of deportation under the provisions of 8 USC §155(c)(2). That the Hearing Officer thereupon denied petitioner's application for suspension of deportation upon the ground that petitioner had failed to establish that he was not a member or former member of the Communist Political Association or the Communist Party. That petitioner thereupon appealed to the Board of Immigration Appeals, who, on March 9, 1954, dismissed petitioner's appeal.

V.

That the said order for petitioner's deportation is void, illegal and unconstitutional in that;

(a) It is not in accordance with the statute authorizing suspension of deportation, or

(b) In the alternative, that the statute authorizing suspension of deportation as construed and applied by the Immigration and Naturalization Service in this case is unconstitutional and void as a bill of attainder, prohibited by Article I, Sec. 9, Clause 3 of the Constitution of the United States, and

(c) The said statute, as construed and applied, violates the guarantee of due process of law in that it is too vague and uncertain to sufficiently apprise petitioner and all other persons affected by the said statute of what is prohibited thereby.

VI.

That the order of deportation is void and illegal in that it resulted from a failure and refusal by the appropriate officials of the Immigration and Naturalization Service of the United States, including the Hearing Officer, the Board of Immigration Appeals, and the Attorney General of the United States, to exercise the discretion to grant suspension of deportation vested in them by the said statute. That the said failure to exercise discretion was based upon the ground that the statute required petitioner to establish that he was not a member of any group or class to whom suspension of deportation was denied by the said statute, 8 USC §155(c), and specifically upon petitioner's failure to establish that he was not and had never been a member of the Com-

munist Political Association or the Communist Party of the United States.

VII.

That at the proceedings before a Hearing Officer of the Immigration and Naturalization Service petitioner was denied a hearing on the charges contained in the warrant of arrest and was subjected instead to an investigation into the status of petitioner in the United States under the immigration laws of the United States. That evidence was received, questions asked and allowed over objection, and conclusions drawn from such evidence and from petitioner's response to or failure to respond to such questions without regard to the relevance or materiality of the said evidence or questions to the charge contained in the warrant of arrest.

That petitioner was thereby denied due process of law as guaranteed by the Fifth Amendment of the Constitution of the United States.

VIII.

That during the course of the said investigation before a Hearing Officer of the Immigration and Naturalization Service, and at the outset thereof, the Hearing Officer announced his intention to sustain the charge contained in the warrant of arrest. That petitioner was thereby denied due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

IX.

That petitioner is informed and believes and on information and belief alleges that the denial of suspension of deportation in his case was based in part upon secret information contained in the file of the Immigration and Naturalization Service and not disclosed to your petitioner, but disclosed to and known by the Hearing Officer who recommended denial of suspension of deportation. That petitioner was thereby denied due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

X.

That petitioner is now held by the Immigration and Naturalization Service without bail. That petitioner has heretofore been at liberty on bond in the sum of \$1,000 and has on all occasions satisfied the conditions of the said bond and appeared whenever required to do so by the Immigration and Naturalization Service. That there exists no valid reason for denying to your petitioner release on reasonable bond or bail pending determination of this application for habeas corpus. That denial of release on bond is an abuse of discretion vested in the District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District, and a denial of reasonable bail guaranteed by the Eighth Amendment to the United States Constitution.

Wherefore, your petitioner prays

(1) That a writ of habeas corpus be directed to

the said Bruce Barber, District Director, Immigration and Naturalization Service for the Thirteenth Immigration District, commanding him to produce the body of petitioner before this Honorable Court at a time and place therein to be specified, then and there to receive and to do what this Honorable Court shall order concerning the detention and restraint of your petitioner, and that your petitioner be ordered discharged from the detention and imprisonment aforesaid; or, in the alternative that an order to show cause be directed to the said Bruce Barber, commanding and ordering him to show cause before this Court on a day certain why the writ as prayed for above should not issue; and

(2) For an order admitting petitioner to bail in such amount as to the Court may seem just, pending final determination of this cause.

/s/ MARTIN JIMENEZ,
Petitioner.

Memorandum of Points and Authorities

I.

A statute inflicting some penalty by legislative fiat upon members of an easily ascertainable group is void as a bill of attainder.

United States v. Lovett,
328 U.S. 303.

II.

The Internal Security Act of 1950 as codified, 8 USC §137 (referred to in the statutory provision for

suspension of deportation, 8 USC §155(c)), has been questioned as a bill of attainder in prior cases. The question is now pending before the Supreme Court of the United States in *Galvan v. Press*, cert. granted 346 U.S. 812 (opinion below, Ninth Circuit, 201 F.2d 302). See also *Heikkila v. Barber*, 345 U.S. 229, recognizing that there is a serious question as to the constitutionality of this statute.

III.

Failure to exercise discretionary power to grant suspension of deportation is reviewable by a petition for habeas corpus, and withholding the exercise of discretion constitutes a denial of due process of law.

United States ex rel *Accardi v. Shaughnessy*,
...U.S...., 22 Law Week 4159, March 15,
1954.

GLADSTEIN, ANDERSEN &
LEONARD,

By /s/ LLOYD E. McMURRAY,
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed April 7, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading the verified petition of Martin Jimenez, and good cause appearing therefor,

It Is Hereby Ordered that Bruce Barber, District Director of the Immigration and Naturalization Service of the United States for the Thirteenth Immigration District, be and appear before this Court on the 14th day of April, 1954, at the hour of 9:30 o'clock, A.M., then and there to show cause, if any he has, why a writ of habeas corpus should not issue herein as prayed, and that a copy of this order be served upon the said Bruce Barber, together with a copy of the petition for writ of habeas corpus herein.

It Is Further Ordered that the petitioner shall be held or allowed to remain within the jurisdiction of this Court until its further order herein.

Dated: April 7, 1954.

/s/ GEORGE B. HARRIS,

United States District Judge.

[Endorsed]: Filed April 7, 1954.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now Bruce G. Barber, District Director, Immigration and Naturalization Service (hereinafter referred to as "the Respondent"), by and

through his attorneys Lloyd H. Burke, United States Attorney for the Northern District of California, and Charles Elmer Collett, Assistant United States Attorney, to show cause why a Writ of Habeas Corpus should not be issued, admits, denies and alleges as follows:

I.

Admits that petitioner by birth is a citizen and national of the Republic of Mexico. Alleges that on March 12, 1927, petitioner was deported under a lawful order of deportation to Mexico. That respondent has no information or belief as to the residence of petitioner subsequent to March 12, 1927. Alleges that if petitioner has resided in the United States subsequent to March 12, 1927, such residence was and is unlawful in that any entry made into the United States subsequent to March 12, 1927, was illegal.

II.

Denies that petitioner is now or has ever been unjustly and unlawfully detained, or that petitioner has ever been imprisoned by the respondent. Any detention of petitioner by respondent was lawful under authority of a valid order of deportation. Respondent affirmatively asserts that petitioner is no longer in his custody and control; that on the 12th day of April, 1954, the above-entitled Court made an order——

“that petitioner Martin Jimenez shall be released upon bail to the Court in the sum of one thousand dollars (\$1,000), conditioned that he will personally appear and answer further

orders herein; and further, that the prior bond presently held by the Immigration and Naturalization Service in his case be exonerated'';

that respondent is informed and believes that a bond in the sum of One Thousand Dollars (\$1,000) was delivered to the Court; that pursuant to said order, the Immigration Bond was exonerated; and that petitioner is not now detained by nor is he in the custody of respondent in any manner or under any authority. Respondent admits that pursuant to a valid deportation order, he intended to deport petitioner from the United States to the Republic of Mexico.

III.

Denies that there was any pretext for the detention of petitioner, and alleges that said former detention was pursuant to and under authority of a valid and lawful final order of deportation issued on March 9, 1954.

IV.

Admits that petitioner was heretofore arrested on a warrant charging him with deportability from the United States by reason of illegal entry into the United States. Admits that a hearing was held before a Hearing Officer as required by law. Admits that during said hearing, petitioner applied for suspension of deportation as alleged. Admits that after full hearing, the Hearing Officer denied the application for suspension of deportation but denies that said application was denied on the ground that petitioner had failed to establish that

he was not a member or former member of the Communist Political Association or the Communist Party. Alleges that at such hearing, petitioner refused to answer questions concerning his membership or affiliation with the Communist Party, Communist Political Association, or other organization on the Attorney General's list of subversive organizations. Alleges that suspension of deportation was denied by the Hearing Officer on the ground that petitioner had failed to establish his eligibility for suspension of deportation. Admits that petitioner's appeal to the Board of Immigration Appeals was dismissed on March 9, 1954.

V.

Denies the allegations contained in Paragraph V of the petition.

VI.

Denies the allegations contained in Paragraph VI, and affirmatively asserts that there was no authority to exercise any discretion in granting of suspension of deportation because petitioner failed to establish his eligibility for such relief.

VII.

Denies the allegations contained in Paragraph VII of the petition.

VIII.

Denies the allegations contained in Paragraph VIII of the petition.

IX.

Denies the allegations contained in Paragraph IX of the petition.

X.

Denies that petitioner is now detained by respondent without bail, and affirmatively asserts that pursuant to the order of this Court dated April 12, 1954, the Immigration Bond was exonerated and respondent no longer has custody or control of the petitioner. Admits that petitioner was previously on liberty under bond in the sum of \$1,000, and that he complied with the conditions of the bond. Respondent denies all other allegations contained in Paragraph X of the petition.

Wherefore respondent prays that the Order to Show Cause be discharged and the Petition for Writ of Habeas Corpus be dismissed.

Dated: April 14, 1954.

/s/ LLOYD H. BURKE,
United States Attorney;

/s/ CHARLES ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Respondent.

[Endorsed]: Filed April 14, 1954.

[Title of District Court and Cause.]

ORDER DISMISSING PETITION FOR
WRIT OF HABEAS CORPUS

The Attorney General, in the exercise of a broad discretion, refused to issue an order of suspension of deportation on the ground that petitioner had

failed to establish eligibility for the issuance of such an order. The power of the Court to set aside the ruling of the Attorney General is narrow and circumscribed. *Galvan v. Press*, S.Ct. No. 407, October term, 1953, decided May 24, 1954. In the light of petitioner's refusal to answer questions concerning membership in or affiliation with specific organizations, the Court may not interfere with the proceedings before the Immigration authorities;

Accordingly, It Is Ordered that the Writ of Habeas Corpus be, and the same hereby is, Denied; that the petition for the Writ be, and the same hereby is, Dismissed, and the order to show cause be, and the same hereby is, Discharged.

Dated: June 2, 1954.

/s/ GEORGE B. HARRIS,

United States District Judge.

United States, ex rel., Harisiades, v. Shaughnessy, 342 U.S. 524.

[Endorsed]: Filed June 2, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now Martin Jimenez, petitioner herein, and appeals from the order of June 2, 1954, dismissing the petition for writ of habeas corpus, denying the issuance of the writ, and discharging the order to

show cause heretofore issued, to the Court of Appeals for the Ninth Circuit.

Dated: June 4, 1954.

GLADSTEIN, ANDERSEN &
LEONARD,

By /s/ LLOYD E. McMURRAY,
Attorneys for Petitioner and
Appellant.

[Endorsed]: Filed June 4, 1954.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, Martin Jimenez is about to apply to the United States Circuit Court of Appeals, 9th District, in the matter of application for a Writ of Habeas Corpus.

Now, Therefore, in consideration of the premises, and of such appeal, the United Pacific Insurance Company, a corporated organization existing under and by virtue of the laws of the State of Washington and authorized to transact a general surety business in the State of California, as Surety, does hereby undertake and promise on the part of the appellant, that said appellant will pay all costs which may be awarded against him on said appeal or on a dismissal thereof, not exceeding Two Hundred Fifty and no/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

And further it is expressly understood that the

United Pacific Insurance Company, as Surety hereunder, in case of a breach of any condition of this bond, agrees that the Court in the above-entitled matter, may upon notice to it of not less than ten days, proceed summarily in the action, suit, case or proceeding, in which the same is given to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

In Witness Whereof, the said United Pacific Insurance Company has caused this obligation to be signed by its duly authorized Attorney-in-Fact at San Francisco, California, and its corporate seal to be hereto affixed, this 4th day of June, 1954.

UNITED PACIFIC
INSURANCE COMPANY.

[Seal] By /s/ ROBERT M. CARLTON,
Attorney-in-Fact.

State of California,
City and County of San Francisco—ss.

On this 4th day of June, 1954, before me, a Notary Public in and for said City and County, personally appeared Robert M. Carlton, personally known to me who, being by me sworn, did state that he is Attorney-in-Fact of the United Pacific Insurance Company, a corporation organized and existing under the laws of the State of Washington, that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that the instrument was signed, sealed and executed in behalf

of said corporation by authority of its Board of Directors and further acknowledged that the said instrument and the execution thereof to be the voluntary act and deed of said corporation, by him voluntarily executed.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal at San Francisco, California, the day and year last above written.

/s/ MARY BLACK,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires November 12, 1956.

[Endorsed]: Filed June 7, 1954.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now appellant herein, and designates as the record on appeal herein the complete record of proceedings had in the District Court, together with the Notice of Appeal and this Designation.

Dated: July 6, 1954.

GLADSTEIN, ANDERSEN &
LEONARD,

By /s/ LLOYD E. McMURRAY,
Attorneys for Appellant,
Martin Jiminez.

Service of copy acknowledged.

[Endorsed]: Filed July 6, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good cause appearing therefor,

It Is Hereby Ordered that the time within which appellant herein may file the record on appeal and docket said appeal with the Court of Appeals be, and it is hereby, extended to and including the 14th day of August, 1954.

/s/ O. D. HAMLIN,

United States District Judge.

[Endorsed]: Filed July 13, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Petition for Writ of Habeas Corpus.

Order to Show Cause.

Return to Order to Show Cause.

Order Dismissing Petition for Writ of Habeas Corpus.

Notice of Appeal.

Cost Bond on Appeal.

Designation of Record on Appeal.

Order Extending Time to File Record on Appeal.

Respondent's Exhibit A.

In Witness Whereof I Have Hereunto set my hand and affixed the seal of said District Court this 12th day of August, 1954.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14,477. United States Court of Appeals for the Ninth Circuit. Martin Jimenez, Appellant, vs. Bruce Barber, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed August 12, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.